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IN THE

Supreme Court of the United States

October Term 1975

No. 75-114

WILLIAM MICHAEL SHAHANE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Question Presented	2
Constitutional Provision Involved	2
Rule Involved	3
Statement of the Case	5
Reasons for Granting the Writ	7
The decision below raises important questions concerning the proper method and effectiveness of voir dire examination of jurors in federal criminal cases and of the remedy required by the Sixth Amendment when a biased juror is disclosed	7
Conclusion	10
Appendix (Opinion of the Court of Appeals)	A-1

CITATIONS

Constitution:	PAGE
Amendment VI	2, 8, 9
Cases:	
Chapman v. United States, 386 U.S. 18 (1967)	8
Dennis v. United States, 339 U.S. 162 (1949)	8
Frazier v. United States, 335 U.S. 511 (1948)	8, 9
St. Clair v. United States, 154 U.S. 134 (1894)	8
Sawyer v. United States, 202 U.S. 150 (1906)	8
Swain v. Alabama, 380 U.S. 202 (1965)	8
United States v. Wood, 299 U.S. 133 (1936)	8
Wheaton v. United States, 133 F.2d 522 (8th Cir. 1943)	8
Wright v. United States, 389 F.2d 996 (8th Cir. 1968)	8
Statutes:	
28 U.S.C. §1254(1)	1
Rule:	
Rule 24, Federal Rules of Criminal Procedure	3, 9
Other:	
Orfield, Trial Jurors in Federal Criminal Cases, 29 F.R.D. 43, 115 (1962)	9

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The petitioner, William Michael Shahane, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on June 18, 1975.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1975, and this Petition is filed within thirty days of this date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether in a marijuana importation prosecution the Sixth Amendment's guarantee of an impartial jury and Rule 24, Federal Rules of Criminal Procedure, require a new trial where it is shown that during voir dire questioning a juror had expressed privately to another prospective juror a bias against persons who use drugs, and against "long-haired lawyers" (referring to defense counsel), and had said she did not know if she could be fair, but concealead these sentiments from the Court and counsel and was therefore not challenged either for cause or peremptorily?

CONSTITUTIONAL PROVISION INVOLVED

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

RULE INVOLVED

Rule 24, Federal Rules of Criminal Procedure

Trial Jurors

(a) Examination. The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

(b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(c) Alternate Jurors. The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall

have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternature jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

STATEMENT OF THE CASE

Jurisdiction of the United States District Court for the District of North Dakota was invoked in the first instance by an indictment charging Petitioner with importing marijuana[1] into the United States by mail from Mexico. The Government's evidence of Petitioner's involvement consisted entirely of his fingerprints and handwriting upon the wrappings of the package which was mailed in Mexico, intercepted at the border, and delivered under surveillance to a Glenburn, North Dakota, post office box. The Court of Appeals rejected a challenge to the sufficiency of the evidence, but conceded that "the government's proof was not as strong as it might have been."[2]

During jury selection, at the specific written request of defense counsel, the trial judge asked the prospective jurors a series of questions to determine whether any of them had any feelings "centered around marijuana or any of the other drugs" which would interfere with their impartiality; and, more generally, whether there was anything they should disclose "so that the attorney can make an objective decision" as to whether they would be fair jurors; and whether they could think of "any other matter . . . which may have some bearing on your qualifications." (Trial Transcript, 23-25).

No juror responded to these questions. During this voir dire examination, however, one prospective juror, Mrs. Burtman, said to another, Miss Aasen, that she "didn't sympathize with anyone using marijuana," and "didn't have any time for anyone who used drugs."[3] Mrs. Burtman also said that she "didn't

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[1] The substance was in the form of liquid hashish.

[2] The evidence is reviewed at length in the opinion of the Court of Appeals, reprinted in the Appendix.

[3] The testimony as to these remarks was elicited upon a motion for a new trial where Miss Aasen appeared as a defense witness. Transcript, Motion for New Trial, 6-8.

have time for long-haired lawyers," a reference to defense attorney Douglas Thomson (the only attorney with long hair present), "she didn't know if she could be fair" and "didn't know if she should be unbiased."[4] These remarks were not disclosed to the Court or counsel at this time.

Mrs. Burtman was selected and sat as a trial juror. When both sides has rested, but before final arguments and instructions, the trial judge learned of these remarks and disclosed them to counsel (T., 208), but ordered all persons involved not to mention the matter further until after a verdict. (T., 209)

A verdict of guilty was returned. The defense moved for a new trial and subpoenaed Miss Aasen as a witness, who testified that Mrs. Burtman had in fact made the foregoing remarks to her during the voir dire examination. The motion was denied. The Court of Appeals affirmed, paraphrasing the trial judge's reasoning as follows:

> The district court found that the juror Burtman adequately understood the questions put to the panel, that while she shared prevailing community views with regard to hair length and drug use or abuse, she was not thereby rendered incapable of giving the defendant a fair trial, and that her views actually were not so emphatic as to require disclosure, and that her failure to disclose them did not in fact prejudice the defendant in his right to an impartial jury or in connection with his attorney's exercise of peremptory challenges.

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[4] Ibid.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW RAISES IMPORTANT QUESTIONS CONCERNING THE PROPER METHOD AND EFFECTIVENESS OF VOIR DIRE EXAMINATION OF JURORS IN FEDERAL CRIMINAL CASES AND OF THE REMEDY REQUIRED BY THE SIXTH AMENDMENT WHEN A BIASED JUROR IS DISCLOSED.

The opinion of the Court of Appeals, if allowed to stand, would virtually nullify the important protections of Rule 24, Federal Rules of Criminal Procedure, which in turn are founded in the Sixth Amendment's guarantee of trial "by an impartial jury." This is so because a conviction was here affirmed even though one of the trial jurors (1) was self-admittedly biased, (2) failed to disclose the bias to the Court and counsel in the face of questioning specifically designed to detect such bias, (3) was therefore not subject to challenge either for cause or peremptorily, but (4) was discovered in time for corrective action to be taken. The defense produced unrebutted evidence of the bias; since the juror herself was not interrogated on the matter there simply is no basis for the lower court's conclusions that "she was not thereby rendered incapable of giving the defendant a fair trial," that "her views actually were not so emphatic as to require disclosure," and that "her failure to disclose them did not in fact prejudice the defendant in his right to an impartial jury or in connection with his attorney's exercise of peremptory challenges." Clearly such conclusions could only properly be based upon examination of the juror herself; the evidence in this record leads

rather to quite opposite conclusions.[5] Therefore the decision below is authority for the notion that an accused has no protection against or remedy for a jury with at least one biased juror.

This Court has repeatedly held that:

> While impaneling a jury the trial court has a serious duty to determine the question of actual bias, and a broad discretion in its rulings on challenges therefor. *United States v. Wood*, [299 U.S. 133, 134 (1936)]; *Frazier v. United States*, [335 U.S. 511, 512 (1948)]. We reaffirm those principles. In exercising its discretion, the trial court must be zealous to protect the rights of the accused. *Dennis v. United States*, 339 U.S. 162, 168 (1949).[6]

In *Wood*, *Frazier* and *Dennis* the challenges were to classes of potential jurors (Government employees), on grounds known to Court and counsel, and there was no evidence of actual bias. Here, in contrast, there was actual bias, but undisclosed, and therefore the Court had no opportunity to exercise its discretion upon a challenge for cause, nor did the accused have a chance to exercise an informed peremptory cha!-

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[5] The Government must be required at least to demonstrate the harmlessness of the Sixth Amendment violation beyond a reasonable doubt, *Chapman v. United States*, 386 U.S. 18 (1967). *Wright v. United States*, 389 F.2d 996 (8th Cir. 1968), and see *Wheaton v. United States*, 133 F.2d 522, 527 (2th Cir. 1943), where the same Court of Appeals held that it was an abuse of discretion to deny a new trial where a communication between a bailiff and jurors "may have been prejudicial" and the Government had not established "by competent evidence that the communication was in fact harmless." The *Wheaton* and *Chapman* decisions were argued below, but ignored in the Court's opinion.

[6] See also *Swain v. Alabama*, 380 U.S. 202 (1965); *Sawyer v. United States*, 202 U.S. 150 (1906); *St. Clair v. United States*, 154 U.S. 134 (1894).

lenge.[7] As Professor Orfield has written in an illuminating and authoritative article:

> Truthful answers on voir dire are tremendously important as they may form the basis for the court's excusing a prospective juror on its own motion, or for challenges for cause or for peremptory challenges. Orfield, Trial Jurors in Federal Criminal Cases, 29 F.R.D. 43, 115 (1962).[8]

The opinion of the Court of Appeals effectively defeats all three available methods for removing a biased juror: on the court's own motion, for cause, or peremptorily. It is intolerable, where actual bias comes to light and remains unrebutted and even undenied by the juror in question, that a new trial should not be ordered;[9] it dilutes the Sixth Amendment's guarantees, it frustrates enforcement of Rule 24, and it leaves the inescapable appearance of injustice since the Court of Appeals has said, in effect, that a person of admitted bias may conceal that bias and sit upon a criminal jury.

The District and Circuit Court's rationalization that this juror merely "shared prevailing community views with regard to hair length and drug use" is most sinister and indeed beside the point. Surely the prevalence in a community of a bias against persons of a particular race or religion would not today be offered as a justification. Surely the prevalence of any

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[7] See *Frazier v. United States, supra*, 335 U.S. at 505: "The right of peremptory challenge is given . . . in aid of the party's interest to secure a fair and impartial jury . . . ." Unlike the *Frazier* case, here there is no question of manipulation of peremptory challenges in order, apparently, to preserve objection to jurors actually selected.

[8] Professor Orfield was a member of the United States Supreme Court Advisory Committee on Rules of Criminal Procedure.

[9] The trial here was a brief one, lasting altogether less than three days and re-trial therefore would have been no significant burden or expense.

form of prejudice does not diminish but enhances the necessity for particularly cautious scrutiny of individual jurors, and underscores the great importance of candor on voir dire and diligence on the part of Court and counsel in jury selection.

An accused may not be entitled to a perfect trial or a jury altogether of his own choosing, but he is Constitutionally entitled to an "impartial" jury free from persons of detectible bias. Here the machinery of detection failed and, what is more, the Court refused to correct that failure when it came to light.

This case offers this Court an opportunity to correct a probable injustice, to remove the certain appearance of an injustice, and, perhaps more importantly, to prevent future injustices of the sort which will inevitably flow from a policy as unsolicitous of the Sixth Amendment as that demonstrated in the courts below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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Dated: July 14, 1975.

APPENDIX

Opinion of the Court of Appeals for the Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1902

UNITED STATES OF AMERICA,

Appellee,

vs.

WILLIAM MICHAEL SHAHANE,

Appellant.

Appeal from the United States District Court
for the District of North Dakota.

Submitted: April 15, 1975
Filed: June 18, 1975

Before VAN OOSTERHOUT, Senior Circuit Judge, JONES, Senior Circuit Judge,* and HENLEY, Circuit Judge.

HENLEY, Circuit Judge.

In November, 1973 William Michael Shahane was indicted by a federal grand jury in the District of North Dakota on a charge of having imported into the United States from Mexico

* Warren L. Jones, United States Court of Appeals for the Fifth Circuit, sitting by designation.

by mail a substantial quantity of marijuana in liquid form in violation of 21 U.S.C. §§ 952(a) and 960(a)(1). The offense was alleged to have been committed on or about April 20, 1973.

Shahane was tried to a jury which found him guilty; he was sentenced to imprisonment for two years in a jail or treatment type institution with one month of the sentence to be served; execution of the remainder of the sentence was suspended, and the defendant was placed on probation for a period of three years. The defendant has duly prosecuted this appeal from the judgment of the district court; the parties will be referred to as they appeared in that court.

The case against the defendant was entirely circumstantial and his primary contention here is that the district court[1] should have sustained his motion and renewed motion for the entry of a judgment of acquittal. Alternatively, defendant contends that the district court erred in overruling his motion for a new trial based upon alleged prejudicial nondisclosure by a juror in the course of voir dire examination.

In passing upon the propriety of the action of the district court in submitting the case to the jury and upon the question of the sufficiency of the evidence to sustain the verdict, we are required to view the evidence in the light most favorable to the government and to give the government the benefit of all inferences reasonably deducible from the evidence. *United States v. Powell*, —— F.2d —— (8th Cir. No. 74-1922 Apr. 21, 1975); *United States v. Cummings*, 507 F.2d 324 (8th Cir. 1974); *United States v. Gaskill*, 491 F.2d 981 (8th Cir. 1974).

The evidence introduced by the government established the following facts which are essentially undisputed.

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[1] Bruce M. Van Sickle, United States District Judge, District of North Dakota.

On April 3, 1973 a paper-wrapped package mailed in the Republic of Mexico was received at the United States Customs Clearing House in El Paso, Texas. The package was addressed to Raymond Romo in care of "The Malones," Glenburn, North Dakota, and it bore the return address of Senora Maria Guzman, Independencia 214 #B, Culiacan, Sinaloa, Mexico.

Attached to the container was a Mexican customs declaration which stated that the contents were a cotton shirt, a cotton blouse, and two jars of "Mole" which is a Mexican condiment resembling barbeque sauce. The value of the contents was stated to be 280 pesos which is about $16.00 in American money.

The package first came to the attention of Abel Flores who is employed by the Customs Service. One of the duties of Flores is to open incoming packages and inspect the contents, primarily for the purpose of determining whether or not they are subject to United States customs duties. Occasionally a package is suspected of containing contraband and may be searched to discover whether it contains prohibited material. One of the things that will prompt a "contraband search" is a valuation of contents which appears to be either too high or too low in relation to the nature or asserted nature of the contents listed on the customs declaration.

Mr. Flores thought that a valuation of $16.00 was excessive for a parcel containing nothing more valuable than a cotton shirt and blouse and two jars of Mole. Accordingly, he opened the parcel, which consisted of a cardboard box and contents wrapped with an inner and outer layer of paper. When Flores removed the wrappers and opened the box, he observed the two articles of clothing and the two jars.

The top of one of the jars had worked loose in transit and some of the liquid contents of the jar had leaked out. Flores

is quite familiar with Mole and he knew at once that the substance that had leaked from the jar was not Mole. Suspecting that the substance was actually a contraband drug, he made a preliminary test and obtained a positive result.

A small sample of the substance was taken and sent to the Customs Service laboratory at San Antonio, and the package was properly secured until a report from the laboratory should be received. On April 17 the report was received and was to the effect that the substance contained in the jars was in fact what the government claimed at the trial was liquid marijuana or liquid hashish.[2]

Arrangements were then made with the postal authorities for the package to resume its journey in the mails to Glenburn which is a small town in the vicinity of Minot, North Dakota. The parcel arrived at Glenburn on April 20 in a special sealed mail pouch which was opened by a Postal Inspector in the presence of a Special Agent of the Customs Service. The package was removed from the pouch and was placed on a shelf in the post office as it would have been placed for delivery in the normal course of business and was kept under observation by one or more of the officers involved in the investigation.

Not too long after the package was placed on the shelf, it was picked up by Mrs. Alice Malone who carried it to her home. She was observed by a Customs Special Agent to carry the package into the house. When he saw her enter the house, he notified another Special Agent by radio that the package was in the house, and he kept the house under observation for some three hours until other officers arrived armed with a search warrant, the validity of which is not questioned here.

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[2] One of the contentions advanced by the defendant at the trial was that the substance in question was not in fact contraband. However, that contention is not urged here.

The officers entered the house and found the parcel in the bedroom of Barbara Malone, presumably the daughter of Mrs. Alice Malone. The daughter was later placed under arrest.[3]

Additional samples of the contents of the jars were obtained, and those samples were sent to the Customs laboratory in Chicago for further analysis. That analysis, like the one in San Antonio, indicated that the substance was marijuana.

It will have been observed that up to this point no mention has been made of the defendant. However, the record reflects that at some time after the search of the Malone house and the seizure of the package, federal officers obtained from military records and from records of the University of North Dakota known specimens of the defendant's handwriting and known finger and palm prints of the defendant.

Those known prints and specimens were sent to the F.B.I. laboratory in Washington, D. C. for comparison with certain latent prints that had been found on the cardboard box and on the inner wrapping of the parcel and with the handwriting appearing on the outer wrapping. The F.B.I. found that a latent print discovered on the box and a single finger print discovered on the inner wrapping were those of the defendant. The F.B.I. also found that all of the handwriting on the outer wrapping was that of the defendant.

At the trial of the case the government introduced competent and substantial evidence to prove the facts that have been related and rested. The defendant moved for the entry of a judgment of acquittal, which motion was denied. The defendant then rested and renewed his motion. The district court

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[3] The record made in connection with the hearing on defendant's motion for a new trial in this case indicates or at least suggests that Barbara Malone was charged in federal court with some offense on the basis of her possession of the marijuana and that she entered a plea of guilty.

reserved ruling on the renewed motion and sent the case to the jury. After the verdict was returned, the defendant filed a formal written motion for a judgment of acquittal notwithstanding the verdict, or, alternatively, for a new trial.

Section 952 of Title 21, U.S.C., prohibits the importation into the United States of certain drugs and substances, including marijuana, and § 960 provides that any person who "knowingly or intentionally" violates § 952 shall be deemed guilty of a felony.

In view of the language of the statute the defendant contends that it was incumbent on the government to prove by competent evidence and beyond a reasonable doubt not only that the defendant handled the package containing the marijuana but also that he knowingly or intentionally mailed the package to an address in the United States, or that he knowingly caused someone else to do so, or that he knowingly aided or abetted someone else in the mailing. In short, the defendant contends that the government was required to prove not only that he handled the parcel but also that he knew at the time what it contained. And the defendant contends that the evidence fell short of establishing guilty knowledge or intent on his part.

The position of the government is that the defendant's unexplained handling of the package in Mexico warranted the jury in finding that he was aware of the contents at the time. and that he intended to cause the drug to be imported into this country illegally.

It is obvious that the jury found that the defendant had handled the package in Mexico, and there is no question that the circumstantial evidence relied on by the government justified that finding; indeed, the defendant does not appear to contend to the contrary. The position of the defendant is that his han-

dling of the parcel prior to its mailing is as consistent with innocent ignorance of the contents of the package as it is with guilty knowledge of what the parcel contained, and that the district court should not have submitted the case to the jury. The defendant further contends that to permit the jury to infer guilty knowledge and intent from the fact of handling, proved by circumstantial evidence, violated the rule that one inference cannot be based on another inference.

It may be conceded to the defendant that the government's proof was not as strong as it might have been. There is no evidence, either direct or circumstantial, as what the defendant was doing in Mexico in April, 1973 or as to what relationships or contacts he had in that country. There is no evidence as to whether the person whose name appeared on the return address on the package or the person to whom it was addressed was a real person or a fictitious person; there is no direct evidence that the defendant handled or even saw the contents of the cardboard box. There is no evidence of any connection between the defendant and the Malone house in Glenburn or between the defendant and either or both of the Malone women who have been mentioned. There is no evidence as to whether the defendant himself lived in Glenburn or whether he had ever been there. There is no evidence as to why the latent prints found on the box and the handwriting on the outer wrapping were compared with the known prints and handwriting of the defendant rather than with those of someone else.

In *Holland v. United States*, 348 U.S. 121 (1954), the Supreme Court held that circumstantial evidence does not differ in principle from direct evidence, and that in order for a jury to convict on circumstantial evidence it is not necessary that the evidence exclude every reasonable hypothesis except that

of guilt but simply that it be sufficient to convince the jury beyond a reasonable doubt that the defendant is guilty. We, of course, are bound by that decision and have recognized it in post-*Holland* cases. *See, e.g., United States v. Kye*, 411 F.2d 120, 122 (8th Cir. 1969) and *United States v. Francisco*, 410 F.2d 1283 (8th Cir. 1969). *See also* the dissenting opinion of Judge (now Mr. Justice) Blackmun in *United States v. Jones*, 418 F.2d 818, 828-29 (8th Cir. 1969).

Notwithstanding *Holland*, this court has held in a number of cases that when a district court in a circumstantial case is faced with a defense motion for the entry of a judgment of acquittal and where it appears that the evidence relied on by the government is as consistent with innocence as it is with guilt, it is the duty of the district court to grant the motion or to set aside a verdict of guilty if the case is submitted to the jury under a reservation of ruling, as was done in this case. *United States v. Steinhilber*, 484 F.2d 836 (8th Cir. 1973); *United States v. Williams*, 470 F.2d 1339 (8th Cir.), *cert. denied*, 411 U.S. 936 (1973); *United States v. Kelton*, 446 F.2d 669 (8th Cir. 1971); *United States v. Jones, supra; Lerma v. United States*, 387 F.2d 187 (8th Cir.), *cert. denied*, 391 U.S. 907 (1968).

It has been suggested that the cases just cited represent a departure from *Holland*, and in his dissent in *Jones, supra*, Judge Blackmun expressed concern at the "circumlocution" of *Holland*, 418 F.2d at 829. And it has also been suggested that there may be some conflict between those decisions and other decisions of this court in which *Holland* has unquestionably been followed.

We find it unnecessary to explore or decide those questions in this case because we are convinced that whatever approach is taken in conformity with *Holland* the government's proof,

in spite of its deficiencies which have been mentioned, was strong enough to take the case to the jury and to sustain the verdict of the jury.

Here, the defendant went into Mexico, which is a prime source of marijuana illegally imported into this country. While there, he handled a package containing the drug; he addressed the package to a person in North Dakota, and he gave the return address of a Mexican woman. The parcel apparently came undisturbed into the hands of American customs officials at El Paso and was found to contain the drug. In our opinion defendant's connection with the package in Mexico called for explanation, and when none was forthcoming the jury was warranted in inferring that the defendant knew what was in the box and acted with criminal purpose and intent.

The jury's finding in this case that the defendant knowingly or intentionally imported or caused to be imported into this country the two jars of liquid marijuana described in the indictment and in the evidence was necessarily based upon the finding that the defendant had handled the package containing the drug while the package was in Mexico, a fact that was established by circumstantial evidence. While that underlying finding may be called an "inference," we do not agree with counsel for the defendant that the ultimate finding of guilty knowledge and intent was an impermissible building of one inference upon another.

The rule that one inference cannot be based on another inference and that one presumption cannot be based on another presumption is based on a recognition that when human beings are called upon to draw conclusions from proved facts they may err or speculate, or do both. And the chance of error or speculation increases in proportion to the width of the gap be-

tween underlying fact and ultimate conclusion where the gap is bridged by a succession of inferences, each based upon the preceding one.

It is too much to say, however, that an inference is necessarily invalid or impermissible because it is based on a fact established in whole or in part by a preceding inference. And the rule in question, as a "rule of evidence," has been discarded in several circuits: *United States v. Harris*, 435 F.2d 74 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 986 (1971); *United States v. Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970); *DeVore v. United States*, 368 F.2d 396 (9th Cir. 1966); *Dirring v. United States*, 328 F.2d 512 (1st Cir.), *cert. denied*, 377 U.S. 1003 (1964). The present status of the "rule" in this circuit is at best questionable. *United States v. Bloom*, 482 F.2d 1162 (8th Cir. 1973).

Here, the fact that defendant had handled the package containing marijuana before it left Mexico was proven by evidence relating to his palm and finger prints and to his handwriting. But that fact would have been no more reliably established had it been proved by eyewitnesses testifying to having seen the defendant with the package in his hands. And we do not think that the jury should have been denied the opportunity to draw from that fact such inferences as appeared proper to the jury simply because the fact was proved by circumstantial rather than by direct evidence.

In view of what has been said, we conclude that the evidence was sufficient to carry the case to the jury and to sustain the verdict. Therefore, the district court did not err in denying defendant's motion and renewed motion for the entry of a judgment of acquittal. It now becomes necessary to determine whether the district court erred in denying defendant's motion for a new trial.

The trial of the case began and the jury was selected on August 26, 1974; the trial was completed on August 27. In the course of the selection of the jury the defendant used all of the ten peremptory challenges allowed him by Fed. R. Cr. P. 24. The voir dire examination of prospective jurors was conducted by the district court, and counsel for the defendant made no complaint as to the form or wording of the questions put to the panel and did not ask for any additional or more specific questions. One of the areas explored by the district court related to whether any of the prospective jurors would be biased or prejudiced by the nature of the offense charged against the defendant. The court's questions in that connective evoked no response from the panel.

The juror with whom we are concerned, Blanche Burtman, was finally seated as a juror; the prospective juror who had sat next to her in the box, Barbara Aasen, was excused. In the course of the voir dire examination Burtman stated to Aasen that there was a question in her mind as to whether she could be an unbiased juror since she had no use for persons who use drugs and did not like "long haired lawyers," a remark evidently directed at defense counsel.

Information of the statements made by Burtman to Aasen came indirectly and at third or fourth hand to Judge Van Sickle on the second day of the trial, and he advised counsel as to what he had heard. It was agreed that nothing would be said about the matter at the time and that the trial should proceed to conclusion with the understanding that if the defendant should be found guilty, he would be free to complain about the juror by means of a motion for a new trial, which he did.

Judge Van Sickle held an evidentiary hearing on the motion. The only witness called to testify was Miss Aasen. In due

course, the district court entered an order overruling the motion, and the order sets out fully the district court's findings of fact and conclusions of law.

The district court found that the juror Burtman adequately understood the questions put to the panel, that while she shared prevailing community views with regard to hair length and drug use or abuse, she was not thereby rendered incapable of giving the defendant a fair trial, and that her views actually were not so emphatic as to require disclosure, and that her failure to disclose them did not in fact prejudice the defendant in his right to an impartial jury or in connection with his attorney's exercise of peremptory challenges.

In reviewing the determination of the district court, the standard that we apply is a narrow one. *See, United States v. Johnson,* 327 U.S. 106 (1946); *United States v. Coleman,* 460 F.2d 1038 (8th Cir. 1972); *United States v. McWilliams,* 421 F.2d 1083 (8th Cir.), *cert. denied,* 397 U.S. 1070 (1970); *Dranow v. United States,* 307 F.2d 545 (8th Cir. 1962); *Johnson v. United States,* 291 F.2d 150 (8th Cir.), *cert. denied,* 368 U.S. 880 (1961). We have considered the record made in the district court, and we do not find that that court misconceived the applicable law, or that its findings on the point in question are without evidentiary support, or that the denial of defendant's motion for a new trial involved any abuse of discretion.

Since we find no error in the proceedings below, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-114

WILLIAM MICHAEL SHAHANE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that certain comments made by a juror revealed such bias that he was denied a fair trial.

Following a jury trial in the United States District Court for the District of North Dakota, petitioner was convicted of having imported marihuana, in violation of 21 U.S.C. 952(a) and 960(a)(1). He was sentenced to two years' confinement in a jail or treatment-type institution, with one month to be served; execution of the remainder of the sentence was suspended and petitioner was placed on probation for three years. The court of appeals affirmed (Pet. App. A-1—A-12).

1. On April 3, 1973, a United States Customs inspector opened a package mailed from Sinaloa, Mexico, and destined for Glenburn, North Dakota, at the customs clearing house in El Paso, Texas (Tr. 51, 53, 59, 61-62). He found inside a wrapped cardboard box containing, among other things, two one-quart jars of a liquid substance, later identified as liquid marihuana or liquid hashish (Tr. 54, 102). On April 20, 1973, the package was delivered as addressed (Tr. 69-73). Following the delivery, the package was seized pursuant to a warrant (Tr. 73). One of petitioner's palm prints was found on the inner cardboard box, and his fingerprint was discovered on the inner wrapper (Tr. 172). It was also determined that petitioner had written the delivery and return addresses on the outer wrapper (Tr. 181).

2. The trial court conducted the *voir dire* examination of prospective jurors, and the attorneys representing petitioner neither objected to the form or wording of the questions put to the panel nor asked any supplemental questions (Pet. App. A-11). One of the areas inquired into by the court concerned the possible bias of members of the panel due to the nature of the offense charged in the indictment.[1] None of the prospective jurors indicated at that time that they would be unable to render a fair and impartial verdict in petitioner's case or would have difficulty abiding by the court's instructions.

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[1]The court questioned propective jurors as a group concerning their possible bias as follows (Tr. 23-25):

> Do any of you know of any reason why you might be prejudiced for or against the Government or for or against the Defendant in this matter?
>
> (No response.)
>
> Now this particular case is one involving what we call a controlled substance. Do any of you have any strong feelings which would affect your capacity to serve as a fair,

At the close of evidence, but before the case had been sent to the jury, the court informed counsel that he had received third or fourth-hand information that one of the jurors, Blanche Burtman, had stated to a prospective juror who had not ultimately been chosen to serve on the jury that she did not like long-haired attorneys or sympathize with those who used marihuana (Tr. 207-208). The court suggested that it

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impartial juror and which are centered around marihuana or any of the other drugs?

(No response).

Do you have a lack of objectivity in that area?

(No response.)

You have been told that the charge against Mr. Shahane is the importation of marihuana, liquid hashish, from New Mexico—correction—from Mexico to North Dakota. Now do any of you feel that you can carry forward the concept of the presumption of innocence—that is, the problem that the Government must prove beyond a reasonable doubt—can you carry forward the presumption of innocence as easily in this case as if he were charged with some other offense that you might feel was more or less serious? For example, a minor speeding matter. Do you think that the nature of the charge itself is going to make it difficult for you to handle the facts and the evidence fairly and impartially?

(No response.)

I take it that you can handle the facts and the evidence impartially.

Now do any of you have any belief or any opinion that the offense of which this Defendant is charged is unique in any respect in the sense that it should be pursued with extraordinary vigor or it shouldn't constitute an offense at all, or that it might carry a penalty which you would consider was improper?

(No response.)

Do any of you have any bias arising in that kind of thinking?

(No response.)

If you were the United States Attorney charged with the responsibility for prosecuting the case or if you were the Defendant's attorney charged with the responsiblity of defending the case, is there something which you as a juror should disclose to that attorney so that the attorney can make

would be preferable not to question juror Burtman at that time and to proceed with the case (Tr. 208-209). Petitioner's attorneys complied without objection (Tr. 210-212).

Following the verdict, petitioner moved for a new trial, charging bias on the part of juror Burtman. At the hearing held on this motion, Barbara Aasen testified that during the *voir dire* examination of prospective jurors, juror Burtman had told her that "she [Mrs. Burtman] didn't sympathize with anyone using marihuana" and that "she didn't have any time for long-haired lawyers" (H. 6-8).[2] The latter comment apparently referred to one of petitioner's attorneys. Mrs. Aasen further testified that juror Burtman had stated that she had not understood some of the court's questions and that she should have said something (*e.g.*, H. 7). Mrs Aasen also testified that she had been reluctant to relay these comments to the court for the following reasons (H. 11-12):

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an objective decision as to whether you could be a fair juror?

(No response.)

If you are selected to sit in this case, would you be unable or unwilling to render a verdict solely on the evidence presented on the trial and the law as I give it to you in my instructions?

(No response.)

Would you be able to disregard any other ideas, notions or beliefs about the law you might have or you might have encountered in the course of reaching your verdict?

(No response.)

Can any of you think of any other matter which you should call to this Court's attention which may have some bearing on your qualifications as a juror? Or which might prevent your rendering a fair, impartial verdict based on the evidence and on my instructions?

[2]"H." refers to the transcript of the hearing held in connection with petitioner's motion for a new trial.

> * * * I just didn't want it that I walk out of the courtroom and tell everything that I hear, you know, and on such a case as this, I felt that everyone has definite opinions about a drug charge and I didn't—just because you have opinions doesn't mean that you can't be an unbiased juror. I thought that everyone has opinions and I, too, have opinions on drugs, and maybe I should have spoken up, you know. And I know people who have taken drugs. I know about it. But I didn't say anything either, and I just felt that maybe that lady, even though she was—had biased opinions, she could still listen to the case and could give an unbiased opinion.[3]

3. Petitioner contends that the trial court erred in denying his motion for a new trial because of bias on the part of juror Burtman. Accepting for present purposes that juror Burtman had negative attitudes toward drug users and persons with long hair, however, those facts would not have warranted the trial court's granting petitioner a new trial in the absence of evidence that those attitudes interfered with her ability to render a fair and impartial verdict. It is a rare case indeed in which jurors are without opinions concerning the crimes of which a criminal defendant stands accused, but the presence of those opinions is not of itself a disqualifying factor. As the trial court properly observed in this case (Tr. 241-242), the burden of establishing prejudice interfering with an impartial verdict rested with the defense. See, *e.g., Swain* v. *Alabama,* 380 U.S. 202,

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[3]Mrs. Aasen also testified that, in making the comments in question, juror Burtman had not been particularly emphatic and had not stated that because of her opinions she would be unable to render an impartial verdict in petitioner's case (*e.g.*, H. 8, 15). Nor did juror Burtman express any opinion to Mrs. Aasen concerning petitioner's guilt or innocence of the charges contained in the indictment (*e.g.*, H. 8-9).

226; *Frazier* v. *United States,* 335 U.S. 497, 503; see also *Irvin* v. *Dowd,* 366 U.S. 717; *Geagan* v. *Gavin,* 292 F.2d 244, 249 (C.A. 1), certiorari denied, 370 U.S. 903. Petitioner failed to carry that burden, and his motion for a new trial was properly denied.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.